

	)	
	)	
In the Matter of License of	)	
	)	
BELWEN, INC.	)	
	)	
	)	
Licensee of Multipoint Distribution Service	)	
MMDS Station WMI297	)	
Wilmington, North Carolina	)	
	)	
	)	
	)	
Petition For Declaration Of	)	
Forfeiture Of License	)	File No. 94-50421
MMDS Station WMI297,	)	
Wilmington, North Carolina	)	
	)	
	)	
Petition For Reconsideration Of	)	
The Grant of the Renewal of License	)	
For Multichannel Multipoint Distribution	)	File No. BRMD-20010402ABJ
Service Station WMI297	)	
Wilmington, North Carolina	)	
	)	
	)	
	)	
	)	

### MEMORANDUM OPINION AND ORDER

**Adopted: November 12, 2003**

**Released: November 13, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

#### I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a Petition for Declaration of License Forfeiture filed by Wireless One, Inc.<sup>1</sup> against Belwen, Inc.<sup>2</sup> For the reasons stated below, we grant the Petition to the extent that we declare that Belwen's license for Multichannel Multipoint Distribution Service (MMDS) Station WMI297 has cancelled; however we take this action on a ground different

<sup>1</sup> Subsequently named Wireless One of North Carolina, L.L.C. (WONC).

<sup>2</sup> See Belwen, Inc. (Belwen) Petition for Declaration of License Forfeiture (filed Aug. 26, 1996) (Petition).

from that proffered in the Petition.<sup>3</sup> We also deny a petition for reconsideration filed by WONC insofar as it requests that we rescind the grant of the renewal application for Station WMI297.<sup>4</sup>

## II. BACKGROUND

2. On February 18, 1992, Belwen was granted a conditional license to construct a new MMDS station on the E Group channels at Wilmington, North Carolina.<sup>5</sup> On February 18, 1993, Belwen filed an application for additional time to construct the station and requested a change of location in order to locate with the adjacent channel MMDS station.<sup>6</sup> The requests were granted on September 21, 1993.<sup>7</sup> On March 25, 1994, Belwen filed a certification that it had completed construction of Station WMI297 and that it was operational and ready to provide service.<sup>8</sup> This certification was accepted, and an operational license was issued on April 12, 1994 with an expiration date of May 1, 2001.

3. On February 21, 1992, Belwen entered into a lease agreement with Microwave Consulting Services, Inc. (MCS), in which Belwen and MCS agreed that MCS would operate and maintain the Station WMI297 on Belwen's behalf.<sup>9</sup> Belwen claims that since the station was authorized, the station has had one subscriber<sup>10</sup> but admits that there have been no wireless cable customers.<sup>11</sup> Belwen states that "Once Wireless One, Inc. had filed its Petition for Declaration of License Forfeiture in 1996, it was feared that the system could not be further developed because of the risk that the license might be in jeopardy."<sup>12</sup>

4. Pursuant to Section 21.911 of the Commission's Rules,<sup>13</sup> MMDS licensees must file annual reports, listing, *inter alia*, the number of station subscribers and the total hours of transmission service

---

<sup>3</sup> Our action herein turns upon an analysis of 47 C.F.R. § 21.303(d), not upon 47 C.F.R. § 21.44, the section on which WONC primarily relies.

<sup>4</sup> Petition For Reconsideration (filed Oct. 22, 2001). Belwen filed an opposition on Nov. 6, 2001 and WONC replied on Nov. 16, 2001.

<sup>5</sup> File No. 1676-CM-P-83.

<sup>6</sup> File No. 50272-CM-MP-93.

<sup>7</sup> File No. 1600B1.

<sup>8</sup> File No. 50421-CM-L-94.

<sup>9</sup> See Channel Lease Agreement, attached to Letter, dated Nov. 10, 2000, from Wayne E. Wagner, President, Belwen, to Sharon M. Bertelsen, Video Services Division, MMB, FCC (*Response Letter*).

<sup>10</sup> See Annual Reports.

<sup>11</sup> The *Response Letter* responded to a letter dated October 12, 2000 from Sharon M. Bertelsen, Mass Media Bureau, to Wayne E. Wagner, President of Belwen, inquiring into the operational history of Station WMI297 (*Inquiry Letter*). Question 4 of the *Inquiry Letter* asked as follows: "Provide the total number of separate subscribers receiving service each year . . . and provide the total number of customers receiving service, from 1994 to the present." Belwen responded: "We have had a single subscriber since 1994. The subscriber is the party to whom Belwen leased the channels. . . . To the best of our knowledge, that lessee has not had wireless cable customers. Once Wireless One, Inc. had filed its Petition for Declaration for License Forfeiture in 1996, it was feared that the system could not be further developed because of the risk that the license might be in jeopardy." Moreover, Belwen claimed in its Annual Report for 2001 and Annual Report for 2002 that it had one subscriber, but also showed in the same one-page reports zero hours of service transmission. See Belwen, Inc. Annual Report Pursuant to Paragraph 21.911 Wilmington, NC – E1-4 Station WMI-297 (Annual Report for 2001 filed March 4, 2002); Belwen, Inc. FRN#0005-0176-29 Annual Report Pursuant to Paragraph 21.911 Wilmington, NC – E1-4 Station WMI-297 (Annual Report for 2002 filed Feb. 20, 2003).

<sup>12</sup> *Id.*

<sup>13</sup> 47 C.F.R. § 21.911.

rendered during the calendar year.<sup>14</sup> Belwen's annual reports indicate that since it certified completion of its station facility, it has had one subscriber, which it has clarified as its lessee, MCS.<sup>15</sup>

5. WONC is the Basic Trading Area authorization holder for Wilmington, North Carolina (B478). On August 26, 1996, WONC filed its Petition.<sup>16</sup> In the Petition, WONC alleges that Belwen did not construct its station and place it into operation before the expiration of the construction period authorized by the Commission, and it did not operate its station on a permanent basis through the license term.<sup>17</sup> Because of this failure, WONC essentially contends, Section 21.44 of the Commission's Rules<sup>18</sup> requires automatic forfeiture of the station license.<sup>19</sup> On September 12, 2000, WONC supplemented its Petition with a declaration by an engineer indicating that he was unable to detect a signal on July 17, 2000 and August 30, 2000 at the transmitter site for Station WMI2997.<sup>20</sup>

6. In support of its argument, WONC primarily relies upon a June 16, 1996 field investigation of Station WMI297's licensed site and electronic monitoring of the station's assigned channels by its director of engineering. WONC notes that in a declaration, its director of engineering indicated that he conducted a survey of the area and facilities at and in the vicinity of geographical coordinates indicated on the license of Station WMI297 and found no MDS/MMDS antennas installed at the site or on any of the surrounding towers.<sup>21</sup> WONC states that using frequency monitoring equipment, its director "listened" to the channels assigned to Station WMI297 and detected no signals, transmissions, or activity.<sup>22</sup> WONC also relies upon a statement, dated June 18, 1996, by the manager of Wilmington Marine Center (WMC). In the statement, the WMC manager states that to the "best of his knowledge," there are no wireless cable signal transmissions emanating from the station's tower.<sup>23</sup> WONC also relies on the engineer's declaration indicating that on July 17, 2000 and on August 30, 2000, it performed an MMDS spectrum scan on the transmitter site for Station WMI297 and was unable to detect a signal.<sup>24</sup> WONC argues that the evidence shows that Belwen either failed to construct the station altogether or constructed the station only temporarily and has since permanently discontinued service.<sup>25</sup> Consequently, WONC argues, pursuant to Section 21.44(a)(3) of the Commission's Rules,<sup>26</sup> the station license was automatically forfeited.<sup>27</sup>

---

<sup>14</sup> See 47 C.F.R. § 21.911(a)(3).

<sup>15</sup> See *Response Letter*, response to Question 4 and attached Channel Lease Agreement.

<sup>16</sup> Belwen filed an opposition on Oct. 8, 1996, to which WONC replied on Oct. 25, 1996. On Sep. 12, 2000 WONC filed a supplement to its Petition, to which Belwen responded on Oct. 13, 2000. On Nov. 20, 2001, WONC filed a second supplement to its Petition. On Dec. 12, 2001 Belwen filed an opposition to the second supplement. On Dec. 21, 2001, WONC filed a reply.

<sup>17</sup> See Petition at 1, 3.

<sup>18</sup> 47 C.F.R. § 21.44.

<sup>19</sup> Petition at 1, 3.

<sup>20</sup> See Supplement to Petition.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* citing Petition Exhibit 4.

<sup>24</sup> Supplement to Petition at 1.

<sup>25</sup> Petition at 4.

<sup>26</sup> 47 C.F.R. § 21.44 (a)(3).

<sup>27</sup> Petition at 5.

7. Belwen, in essence, responds that it constructed its facility in accordance with the terms of its license, and that WONC's claims of non-operation are unfounded.<sup>28</sup> Belwen indicates that Section 21.44(a)(3) applies only to "voluntary" removal or alteration of facilities, and if service was interrupted as WONC contends, it was due to severe weather, and thus, any interruption in service occurred involuntarily.<sup>29</sup> Finally, Belwen argues, in essence, that WONC has acted in bad faith by filing its Petition and that the Commission should investigate WONC's fitness to be a licensee.<sup>30</sup>

8. On October 12, 2000, the Commission staff sent to Belwen a letter of inquiry,<sup>31</sup> to which Belwen responded on November 13, 2000.<sup>32</sup> On November 28, 2000, WONC filed a letter commenting on Belwen's response.

9. On September 20, 2001, the Commission granted Belwen's renewal application for its license of Station WMI297.<sup>33</sup> On October 22, 2001, WONC filed a petition for reconsideration of the grant, requesting that the Commission rescind the grant of the Station WMI297 renewal application and that such application be returned to pending status until the Commission acts on the Petition.

### III. DISCUSSION

10. Based on the record before us, we find insufficient evidence to conclude that Section 21.44(a)(3) of the Commission's Rules<sup>34</sup> requires automatic forfeiture of Belwen's Station WMI297 license as WONC contends. However, explained in further detail below, we find Belwen did not provide service as Section 21.303(d)<sup>35</sup> requires, and after analyzing the facts and circumstances under the latter provision, we declare that Belwen's license has cancelled. In sum, we find that an analysis under Section 21.303(d) of the Commission's Rules<sup>36</sup> is dispositive of the case.

11. We find insufficient record evidence to conclude, as WONC contends, that Belwen either failed to construct its station altogether or constructed the station only temporarily and has since permanently discontinued service, requiring an automatic forfeiture of the station license pursuant to Section 21.44(a)(3) of the Commission's Rules.<sup>37</sup> Section 21.44(a)(3) requires automatic forfeiture of a station license upon "[t]he voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more."<sup>38</sup> WONC shows, at best, that on the date of WONC's field inspection and on the two dates of its spectrum scanning, the station was not transmitting. WONC provides an insufficient foundation for us to assess the knowledge and credibility of the June 18, 1996 statement of the station tower's non-operational status from WMC's manager. Moreover, we cannot

---

<sup>28</sup> Opposition at 1-2.

<sup>29</sup> Response to Supplement at 1-2.

<sup>30</sup> Opposition at 1, 5-6.

<sup>31</sup> Letter, dated Oct. 12, 2000, from Sharon M. Bertelson, Supervisory Attorney, MDS Section, Video Services Div., Mass Media Bureau, FCC, to Wayne E. Wagner, President, Belwen. (*Inquiry Letter*).

<sup>32</sup> *Response Letter, supra*.

<sup>33</sup> File No. BRMD-20010402ABJ.

<sup>34</sup> 47 C.F.R. § 21.44(a)(3).

<sup>35</sup> C.F.R. § 21.303(d).

<sup>36</sup> *Id.*

<sup>37</sup> 47 C.F.R. § 44 (a)(3). *See* para. 6, *supra*.

<sup>38</sup> 47 C.F.R. § 44(a)(3).

attribute any veracity to the statement, given the manager's subsequent repudiation of it.<sup>39</sup> WONC also does not provide information on whether any non-operation was caused by voluntary actions on the part of Belwen, or on the duration of the claimed unconstructed station status or the period of non-operation. We will not infer from "snapshots" of the station's operations that there is sufficient evidence to conclude that Section 21.44(a)(3) requires automatic forfeiture of Belwen's station license.

12. We nonetheless conclude, based on the information before us, that the station license cancelled pursuant to Section 21.303(d) of the Commission's Rules.<sup>40</sup> The express language of Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ." <sup>41</sup> The three options are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver pursuant to Section 21.303(d)(3).<sup>42</sup> Significantly, prior to the adoption of Section 21.303(d), the Commission's Rules did not require licensees to relinquish unused frequencies.<sup>43</sup> The Commission found that, "[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized."<sup>44</sup> Therefore, the Commission adopted Section 21.303(d) to ensure the efficient use of the spectrum by requiring licensees to submit licenses covering unused spectrum to the Commission for cancellation.<sup>45</sup>

13. Section 21.303(d) explicitly requires Belwen to provide "service." We do not believe that Belwen fulfilled this requirement. Although Belwen claimed to have one "subscriber," it admits that it has not had any wireless cable customers,<sup>46</sup> and its annual reports for 2001 and 2002, filed pursuant to Section 21.911 of the Commission's Rules,<sup>47</sup> clearly show that Belwen did not transmit any programming or otherwise provide service for those years. Such non-service is plainly inconsistent with the Commission's underlying purpose of ensuring that spectrum is used efficiently and effectively.<sup>48</sup> In adopting Section 21.303(d), the Commission found that twelve months "should be more than enough time for new licensees to begin providing service, if, indeed there is any demand."<sup>49</sup> The Commission indicated that where a licensee such as Belwen is unable to find an actual customer within that period, it might obtain additional time by seeking a waiver pursuant to Section 21.303(d)(3).<sup>50</sup> Yet, Belwen made no attempt to seek a waiver and, therefore, was required to submit its station license for cancellation. We find nothing in the record to excuse Belwen's failure to comply with Section 21.303(d) of the

---

<sup>39</sup> See Opposition, Exhibit A (statement by Mr. Fry: "I apologize for any confusion created by my letter dated June 18, 1996 . . . I have never attempted to determine whether any transmissions are emanating from the tower, but I have reason to doubt your statement that the equipment is activated and transmitting.").

<sup>40</sup> 47 C.F.R. § 21.303(d).

<sup>41</sup> *Id.*

<sup>42</sup> See 47 C.F.R. § 21.303(d)(1)-(3).

<sup>43</sup> See Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987) (*Part 21 R&O*)).

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *Response Letter*, *supra*.

<sup>47</sup> 47 C.F.R. § 21.911

<sup>48</sup> See *Part 21 R&O*.

<sup>49</sup> *Part 21 R&O*, 2 FCC Rcd at 5724 ¶ 83.

<sup>50</sup> See *id.*

Commission's Rules and, therefore, declare that Belwen's license for Station WMI297 cancelled after a twelve-month period of nonuse, on December 31, 2001.

14. Since we have found that Belwen's license cancelled after the date of our grant of the renewal application for the Station WMI297 license, September 20, 2001, we deny WONC's petition for reconsideration to the extent that it requests that we rescind the grant. We otherwise do not address, as the issue is moot, WONC's request that the application for renewal be returned to pending status until the Commission acts on the Petition.<sup>51</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons stated above, we conclude that Belwen's station license is cancelled pursuant to Section 21.303(d) of the Commission's Rules.<sup>52</sup> With respect to the Belwen's allegation that WONC acted in bad faith by filing its Petition, we find WONC's pleadings are not an abuse of the Commission's processes pursuant to Section 1.117 of the Commission's Rules.<sup>53</sup> In light of our conclusions, we grant WONC's petition for reconsideration only to the extent that it requests that we rescind the grant of the renewal of the license for Station WMI297.

14. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.303(d) and 1.41 of the Commission's Rules, 47 C.F.R. § 21.303(d) and 47 C.F.R. § 1.4, that the petition for declaration of license forfeiture filed by Wireless One, Inc., on August 26, 1996 in connection with Station WMI297, only to the extent reflected herein, IS GRANTED.

15. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.303(d) of the Commission's Rules, 47 C.F.R. § 21.303(d), that the license for Station WMI297 IS DEEMED CANCELLED.

16. IT IS FURTHER ORDERED that with respect to the petition for reconsideration filed by Wireless One of North Carolina, L.L.C. on October 22, 2001 regarding the grant of the renewal application for Belwen Inc.'s license (File No. BRMD-20010402ABJ), the petition is denied to the extent that it requests that the grant BE RESCINDED; the remaining issues are deemed moot and DISMISSED.

17. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, the grant of the renewal application for Belwen's license (File No. BRMD-20010402ABJ) IS RESCINDED.

---

<sup>51</sup> See Petition For Reconsideration.

<sup>52</sup> 47 C.F.R. § 21.303(d).

<sup>53</sup> 47 C.F.R. § 1.17.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau